Before Mr. Justice Wilson and Mr. Justice Porter.

NOWRAT ROY AND OTHERS (DEFENDANTS) *v.* LALA KEDAR NATH (PLAINTIFF).* 1886 *July* 9.

Act XL of 1858, *s.* 3—*Certificate of Guardianship—Certificate ordered, but not issued, Effect of—Limitation.*

A certificate of guardianship, obtained under s. 3 of Act XL of 1858, takes effect from the time it is issued, and not from the date of the order directing its issue.

Sahai Nand v. *Mungniram Marwari* (1) followed.

THIS was a suit brought on the 12th May 1884 by a person who alleged he was adopted on the 13th April 1863, under a deed of authority, dated August 1845, to set aside certain alienations made in 1859 by his adoptive mother. At the date of this alleged adoption the plaintiff was of the age of one year; the adoptive mother died in 1285 F. S., (1878), and thereupon one Lala Topsiram applied to the Court for a certificate of guardianship under Act XL of 1858, and obtained an order appointing him guardian of the minor; this certificate was, however, never issued.

The main question in this suit was whether the suit was barred by limitation, *viz.*, whether the order for the issue of the certificate of guardianship to Lala Topsiram had the effect of deferring the plaintiff's majority to such time as he might attain his twenty-first year; or whether by reason of the abandonment of that order without taking out a certificate thereunder, the plaintiff had attained his majority at eighteen?

The Court of first instance held that as the certificate had never issued, the plaintiff attained his majority at the age of 18 years, and that therefore the suit was barred. The lower Appellate Court held that the order of the Court granting the certificate was sufficient of itself to bring the minor within the provisions of s. 3 of Act IX of 1875, and therefore that the suit

* Appeal from Appellate Order No. 121 of 1886, against the order of H. W. Gordon, Esq., Judge of Chuprah, dated the 29th of December 1885, reversing the order of Baboo Matadin, Subordinate Judge of that district, dated the 30th of December 1884.

(1) I. L. R., 12 Calc., 542.

Chowdhry (1) a different view was taken by Field and Macpherson, JJ., who held that the making of the order for, and not the taking out of, the certificate, is that by which a guardian is appointed. On a later occasion the matter came again before another Bench of this Court in the case of *Sahai Nand* v. *Mungniram Marwari* (2), and Tottenham and Norris, JJ., who decided that case, followed the view taken by Garth, C.J. and Cunningham, J., already noticed.

It appears to us therefore that there is a distinct preponderance of authority in this Court in favour of the view that a certificate of guardianship takes effect from the time it is issued—a view, which, in our opinion, is in accordance with the true construction of the statutes themselves.

The result is that the order of remand by the District Judge must be set aside, and that the decree of the first Court must stand.

The appellant will have his costs in this and the lower Appellate Court.

T. A. P. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice Porter.

AGA MAHOMED HAMADANI (PLAINTIFF) *v.* COHEN AND OTHERS (DEFENDANTS).* 1886 *July* 22.

Burma Courts Act (XVII of 1875), *ss.* 49, 97—*Civil Procedure Code Act (XIV of* 1882), *ss.* 3, 4, 540—*Limitation Act (XV of* 1877), *Sch. II, Art.* 156.

An appeal from the Court of the Recorder of Rangoon to the High Court is an appeal under the Civil Procedure Code, and must be made within the time prescribed by Art. 156, Sch. II, of the Limitation Act.

THE plaintiff sued the Directors of the Kamindine Burra Bazar Co., Ld., to recover from them five shares, or the value thereof, in the said Company which shares had become forfeited through failure to pay calls made thereon. The suit was valued

* Appeal from Original Decree No. 269 of 1885, against the decree of Charles John Wilkinson, Esq., Recorder of Rangoon, dated the 1st of December 1882.

(1) I. L. R., 8 Calc., 967. (2) I. L. R., 12 Calc., 542.

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at Rs. 3,070. The defence was that the Directors had not been duly elected, and had no power to make the calls. On the 1st December 1882 the Recorder of Rangoon, before whom the case was heard, dismissed the suit with costs.

The plaintiff appealed to the High Court, presenting his memorandum of appeal on the 18th February 1885. The Deputy Registrar refused to admit the appeal without the sanction of the Court. On the 19th February Garth, C.J., and Wilson, J. admitted the appeal subject to argument at the hearing as to whether the appeal was barred as being presented out of time.

On the appeal coming on for hearing—

Mr. *Pugh* (Mr. *Watkins* with him) appeared for the appellant.

Mr. *Evans* (Mr. *Simmons* with him) appeared for the respondents.

Mr. *Evans* took a preliminary objection that the appeal was out of time.

Mr. *Pugh* contended that the appeal was not one under the Civil Procedure Code, but under the Burma Courts Act, and that therefore, inasmuch as no period of limitation was provided by that Act for appeals to the High Court, Art. 156 of Sch. II of the Limitation Act could not apply.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows :—

We think that this matter is really free from doubt. The question is whether the present appeal, which is an appeal from a decision of the Recorder of Rangoon, was filed within time or out of time ; and that depends upon whether it is, or is not, governed by Art. 156 in the second schedule of the Limitation Act. That article says that an appeal under the Code of Civil Procedure to a High Court, except in certain cases mentioned, must be brought within ninety days from the date of the decree or order appealed against.

What we have to decide is whether an appeal from the Recorder's Court of Rangoon to this Court is an appeal under the Code of Civil Procedure.

The Acts relating to the matter are these :—*First*, the Burma Courts Act (XVII of 1875). That Act provides for the

organization and the jurisdiction of the various Courts therein mentioned. Chapter IV deals with the Court of the Recorder of Rangoon, and s. 49 in that Chapter says: "There shall be no appeal from the decree or order of the Recorder passed in any original suit or proceeding where the amount or value of the subject-matter does not exceed three thousand rupees; but where the amount or value of the suit or proceeding in the Recorder's Court exceeds three thousand rupees, and is less than ten thousand rupees, an appeal shall lie to the High Court." And s. 97 enacts that, "save as otherwise provided by this Act, the Code of Civil Procedure shall be, and shall, on and from the 15th day of April 1872, be deemed to have been in force throughout British Burma." The Code of Civil Procedure in force at that time was Act VIII of 1859. Then we turn to the present Procedure Code, which is in the main identical with the Code of 1877. It applies in general terms to the whole of British India, and therefore includes British Burma. Then s. 3 says, that when in any Act reference is made to Act VIII of 1859, (that is, the Procedure Code of 1859), or Act XXIII of 1861, (that is, the amending Act), or the Code of Civil Procedure, or to Act X of 1877, such reference shall, so far as practicable, be read as applying to this Code, or the corresponding part of it. The consequence of that section is that in the Burma Courts Act we must now read s. 97 as incorporating the present Civil Procedure Code.

Then s. 4 says: "Save as provided in the second paragraph of s. 3 (the paragraph which I have just read), nothing herein contained shall be deemed to affect the following enactments," amongst which is the Burma Courts Act of 1875. The meaning of that kind of saving clause has been very often considered. There is no doubt that the meaning is that, if anything in the Code is found to conflict with anything in the Burma Courts Act, the Code shall not prevail to override the inconsistent provisions in the Burma Courts Act, so far as they are inconsistent.

Then comes s. 540, which says: "Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees or from any part of the

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decrees of the Courts exercising original jurisdiction to the Courts authorised to hear appeals from the decisions of those Courts." That is a general provision not conflicting with any enactment in the Burma Courts Act or any other Act by which an appeal was excluded, because that exclusion is expressly saved, and not prescribing for Burma or any other part of British India to what Court any appeal shall lie, but merely laying down the broad rule that where an appeal is not expressly excluded an appeal shall lie to whatever Court under the enactment in force may be the proper Court. That is the state of the enactments on this matter.

Now, what is meant by an appeal under the Civil Procedure Code ? A particular appeal was given by the Burma Courts Act, and the Burma Courts Act is still the only Act which prescribes to what Court this appeal shall lie. If it had not been given by the Burma Courts Act then s. 540 of the Civil Procedure Code would have been sufficient to give it, provided that some Court was by some enactment provided as the proper Court to hear the appeal. The procedure in appeals in every respect is governed by the Code of Civil Procedure. The Limitation Act, Sch. II, Art. 156, when it speaks of the Civil Procedure Code is, on the face of it, speaking of a Code which relates to procedure, and does not ordinarily deal with substantive rights: and the natural meaning of an appeal under the Civil Procedure Code appears to us to be an appeal governed by the Code of Civil Procedure so far as procedure is concerned.

It appears to us therefore that this appeal is clearly out of time, and must be rejected on that ground. The respondent is entitled to his costs.

Since this case was heard our attention has been called to the case of *Mahomed Hossein* v. *Inodeen* (1). That case, however, does not seem to us to have any close bearing upon the present. It was there held that Art. 156, Sch. II of the Limitation Act does not apply to proceedings under s. 27 or s. 34 of the Burma Courts Act. Section 27 gives power to the Judicial Commissioner (who is, we presume, in such a case, by reason of s. 2 of the General Clauses Act, a High Court within the meaning of

(1) I. L. R., 10 Calc., 946.

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the Limitation Act) under certain circumstances, if in his discretion he thinks fit to do so, to admit a second appeal. Section 34 empowers him, in certain cases, to send for the record of a case and deal with it in his discretion. To apply Art. 156 to such cases would be to use it, not to restrict any rights given to the parties, but to curtail a discretion given to the Court. And this was the ground of decision. Moreover, the procedure under those sections is quite foreign to the Civil Procedure Code.

T. A. P. *Appeal dismissed,*

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

SEW BUX BOGLA *v.* SHIB CHUNDER SEN AND ANOTHER.

1886 *July* 30.

Civil Procedure Code (Act XIV of 1882), *ss.* 295, 622—*Rateable distribution —Material irregularity affecting the merits of the case.*

The words of s. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors.

The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code.

The words "a material irregularity" in s. 622 of the Code of Civil Procedure, include an irregularity of procedure materially affecting the merits of the case.

An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section, *Magni Ram* v. *Jiwa Lal* (1) observed on.

THIS was a rule calling upon one Bhugwan Doss to show cause why an order of the Officiating Chief Judge of the Small Cause Court should not be set aside under s. 622 of the Code of Civil Procedure.

The facts of the case were as follows:—

On the 23rd June 1885 one Sew Bux Bogla obtained a decree for Rs. 1,397-11, in the Calcutta Court of Small Causes, against Shib Chunder Sen and Hurry Narain Sen, which directed payment to be made by monthly instalments of Rs. 50.

(1) I. L. R., 7 All., 336.

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was not barred, as the plaintiff would attain his majority at twenty-one; the suit was therefore remanded for re-hearing.

The defendants appealed to the High Court.

Baboo *Umakali Mookerjee* for the appellants contended that the suit was barred; that the effect of the mere order granting the certificate of guardianship under Act XL of 1858 was not of itself sufficient to bring the minor under the provisions of s. 3 of the Majority Act—*Stephen* v. *Stephen* (1).

Moulvi *Mahomed Yusoof* for the respondent contended that the suit was not barred; and cited, as to the effect of the order without issue of the certificate, *Chunee Mul Johurry* v. *Brojo Nath Roy Chowdhry* (2).

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

The only point before us in this appeal is as to the date on which the plaintiff is to be taken to have attained his majority, whether on the completion of his eighteenth or on the completion of his twenty-first year. If a guardian was duly appointed according to law, then under the Majority Act he would not attain his majority until the completion of his twenty-first year. If such appointment of a guardian was not duly made, he would attain his majority on the completion of his eighteenth year.

The fact is, as found, that an application was made for a certicate of guardianship, and an order was passed for the issue of a certificate, but that order was apparently abandoned, and no certificate was ever obtained.

It appears to us that under the Minors' Act it is the certificate which creates the relation of guardian and ward, and that the actual obtaining of the certificate is what is meant by the appointment of a guardian referred to in the Majority Act.

In the case of *Stephen* v. *Stephen* (1) it was held by Sir Richard Garth and Mr. Justice Cunningham, confirming a judgment of the Original Side of this Court, that a certificate of guardianship takes effect not from the date of the order granting it, but from the time the certificate is actually issued. On the other hand, in the case of *Chunee Mul Johurry* v. *Brojo Nath Roy*

(1) I. L. R., 9 Calc., 901. (2) I. L. R., 8 Calc., 967.

Chowdhry (1) a different view was taken by Field and Macpherson, JJ., who held that the making of the order for, and not the taking out of, the certificate, is that by which a guardian is appointed. On a later occasion the matter came again before another Bench of this Court in the case of *Sahai Nand* v. *Mungniram Marwari* (2), and Tottenham and Norris, JJ., who decided that case, followed the view taken by Garth, C.J. and Cunningham, J., already noticed.

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The appellant will have his costs in this and the lower Appellate Court.

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